

C/015/025 Incoming
 CC: Steve A.
 Dana D.
 Daron

8

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UNITED STATES BANKRUPTCY COURT
 FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

In re:

C. W. MINING COMPANY, a Utah
 corporation,

Debtor and Debtor in Possession.

Bankruptcy Case No. 08-20105

(Chapter 11)

Hon. Judith A. Boulden

[Filed Electronically]

**MEMORANDUM IN SUPPORT OF *EX PARTE* MOTION
 OF AQUILA, INC. FOR ORDER TO SHOW CAUSE WHY
 HIAWATHA COAL COMPANY, INC. AND ELLIOT FINLEY
 SHOULD NOT BE HELD IN CIVIL CONTEMPT**

Aquila, Inc. ("Aquila") submits the following Memorandum in support of its *Ex Parte* Motion for Order to Show Cause Why Hiawatha Coal Company, Inc. and Elliot Finley Should Not Be Held in Civil Contempt (the "OSC Motion").

RECEIVED

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DIV. OF OIL, GAS & MINING

INTRODUCTION

Hiawatha Coal Company, Inc. ("Hiawatha") is an entity related to the Debtor. Elliot Finley ("Finley") is Hiawatha's President and Resident Agent. Hiawatha and Finley had actual knowledge of this Court's Order Denying in Part and Granting in Part Motion For Order Preserving and Protecting Assets of Bankruptcy Estate (Docket No. 139), defined as the "Preservation Order" below.

Despite this knowledge, they violated 11 U.S.C. § 362(a)(3) and totally disregarded this Court's Preservation Order (a) by attempting to have the Debtor's Utah Division of Oil, Gas and Mining ("DOGM") mining permit transferred to Hiawatha, and (b) by continuing to assert that Hiawatha, not the Debtor, is the entity with authority to mine coal. Aquila requests entry of an Order to Show Cause (the "OSC") requiring Hiawatha and Finley to appear and show cause why they should not be held in civil contempt for their willful violations of the automatic stay that are in open defiance of the Preservation Order.

BACKGROUND

The Permit and the Bankruptcy Case

1. On January 8, 2008 (the "Petition Date"), petitioning creditors Aquila, Howell Precast, LLC, and House of Pumps commenced the above-captioned case by filing an Involuntary Petition against the Debtor under 11 U.S.C. § 303.

2. At some time prior to the Petition Date, the State of Utah, through DOGM, issued Permit C/015/0025 to C.W. Mining Company d/b/a Co-op Mining Co. (the "Debtor" or "CWM"), authorizing the Debtor to mine coal at the Bear Canyon Mine (the "Permit"). (*See Exhibit 1* at p. 3 (State Inspection Report dated Oct. 7, 2008, stating that the Permit was issued

on April 2, 2007); Exhibit 2 at p. 7 (Debtor's Notice dated July 1, 2008 indicating that Permit was renewed in Nov. 2005).)

3. According to the State of Utah, on the Petition Date and at all times since, the Debtor has been the holder of the Permit. The State of Utah only recognizes the Debtor as the entity with authority to operate the mine. (See Exhibit 1 (State Inspection Report dated Oct. 7, 2008, identifying "CO-OP MINING CO" as "Permitee," stating that the "Permit Status" is "ACTIVE," and noting that the Permit was issued on April 2, 2007 and expires on Nov. 2, 2010); Exhibit 3 (State Inspection Report dated Sept. 8, 2008, identifying "CO-OP MINING CO" as "Permitee," stating that the "Permit Status" is "ACTIVE," and noting that "Permitee has submitted an ownership and control change to the Division which would transfer all assets . . . to Hiawatha" and which "is currently being reviewed within the Division, in conjunction with review by the US Bankruptcy Court.")).

4. As late as July 1, 2008, seven months after the Petition Date, the Debtor acknowledged its status as holder of the Permit. (See Exhibit 2 at p. 7.) As late as October 1, 2008, Hiawatha has acknowledged that the Debtor is the holder of the Permit. (*Id.* at pp. 1 & 4-5.)

5. The Debtor unsuccessfully contested the Involuntary Petition. On September 26, 2008, this Court entered an Order for Relief against the Debtor under chapter 11 of the Bankruptcy Code (Docket No. 204).

The Attempted Sale to Hiawatha Coal Company and the Preservation Order

6. On July 7, 2008, Aquila filed a Motion for Order Preserving and Protecting Assets of Bankruptcy Estate and Requiring Notice and Hearing in Connection with Debtor's Purported Sale of Substantially All Operating Assets to a Related Entity (Docket No. 71) (the "Preservation Motion"). Among other things, the Motion sought (a) an order prohibiting the Debtor from using, transferring, encumbering, or disposing of any of its assets outside the ordinary course of business without first obtaining Court approvals, and (b) an order requiring the Debtor to give to parties in interest and the Court prior notice of any efforts to sell or transfer its assets.

7. On August 8, 2008, after an evidentiary hearing, the Court entered its Order Preserving and Protecting Assets of Bankruptcy Estate (Docket No. 139) (the "Preservation Order") and a Memorandum Decision (Docket No. 138) (the "Memorandum Decision"), partially granting Aquila's Preservation Motion. Copies of the Preservation Order and the Memorandum Decision are attached as part of Exhibit 4 hereto.

a. The Court found that: (i) it has jurisdiction over the Debtor and property of the estate, as defined in section 541 of the Bankruptcy Code, (Memorandum Decision at 4); (ii) after the Petition Date, sometime in June 2008, the Debtor entered into a Purchase and Sale Agreement with Hiawatha under which "the Debtor sold or is in the process of selling substantially all of its operating assets to Hiawatha," (*id.* at 3); (iii) that this purported sale was "through an assumption of liabilities only," (*id.*); and (iv) that the Debtor's President and "most of the miners once employed by the Debtor are now employed by Hiawatha," (*id.* at 4).

b. In partially granting the Preservation Motion, the Court ordered as follows:

ORDERED that any attempt from this point forward to transfer, sell or to seek approval of the transfer or sale of the Debtor's assets to Hiawatha Coal Mining Company (Hiawatha) or any other party outside the ordinary course of the Debtor's business must be set for hearing and properly noticed out to all parties pursuant to the Bankruptcy Code and Bankruptcy Rules. This order applies to any portion of the Sale Agreement between the Debtor and Hiawatha that has not yet been consummated including the approval of the sale by various governmental agencies and regulatory agencies or commissions.

(Preservation Order at p. 3; *accord* Memorandum Decision at p. 9.)

c. Notably, the Court also held that upon the filing of the Involuntary Petition, the automatic stay went "into effect precluding parties from taking various actions against [the] debtor or property of the estate." (Memorandum Decision at p. 6; *see id.* at p. 10.)

8. On August 8, 2008, Aquila served copies of the Preservation Order upon the Debtor, certain governmental and regulatory bodies, including DOGM, and various other parties in interest. (*See* Notice of Order (Docket No. 140).)

Hiawatha's Violation of the Automatic Stay and Disregard of the Preservation Order

9. After service of the Preservation Order, DOGM copied Aquila on a letter dated September 4, 2008 that DOGM sent to "Shawn Baker, Resident Agent of Co-Op Mining Company" regarding "Incomplete Application for Transfer of Bear Canyon Mine Permit to Hiawatha Coal Company, Task ID #3022, Co-Op Mining Company, Bear Canyon Mine, C/015/0025" (the "DOGM Letter"), a copy of which Aquila filed with the Court (Docket No. 184) and which is attached hereto as Exhibit 5. DOGM references the Debtor's "application to

control change ownership and control information in the Bear Canyon MRP”¹ and states:

We view this as an application to transfer the Bear Canyon Permit to Hiawatha . . . and at this point it is considered to be incomplete. . . . We are aware that the bankruptcy court has ordered the permit holder to refrain from transferring its permit without the court’s consent. Therefore, we will continue our review and issue a decision on the permit transfer application only after Co-op Mining (1) provides the information listed above and (2) demonstrates that the court will allow the transaction to proceed.

(DOGM Letter at pp. 1-2.)

10. Since the Preservation Order was entered, Aquila has obtained certain documents relevant to the Debtor’s Permit, available on DOGM’s website (<https://fs.ogm.utah.gov/>),² which show as follows:

a. Hiawatha had actual notice of the Preservation Order by no later than August 13, 2008, as confirmed by an email sent on that date by Mark Reynolds of Hiawatha (who was an employee of the Debtor prior to the purported transfer of assets to Hiawatha) to Dana Dean of DOGM and Steve Alder of the Utah Attorney General’s Office, by which Hiawatha forwarded a copy of “Judge Boulden’s ruling” (*i.e.*, the Preservation Order and related Memorandum Decision) to DOGM. Copies of the August 13, 2008 email and attachments are attached hereto as **Exhibit 4**.

b. Despite having actual knowledge of the Preservation Order, Hiawatha has continued and even increased its efforts to convince DOGM to approve the Debtor’s incomplete application to transfer the Permit to Hiawatha. For example, Elliot Finley of

¹ Aquila does not know when the Debtor made this application to the DOGM, and whether it violated the August 8th Preservation Order. Prior to the entry of the Preservation Order, the Debtor published a notice “announc[ing] its intent to transfer Permit No. C/015/025 originally issued November 1, 1985 and last renewed November 2, 2005 to Hiawatha Coal Company.” (**Exhibit 2**, Hiawatha Letter at p. 7.)

² This page states that for “Public Access to Browse Coal Permit Files (You need a username and password to access these files -use ogmquest for both the username and password)” (emphasis in original).

Hiawatha sent a letter dated October 3, 2008 to DOGM regarding "Application to Change existing Mining Plan, Permit Transfer Task ID #2022 Bear Canyon Mine, ACT/015/025[.]" a copy of which is attached hereto as **Exhibit 2** (the "Hiawatha Letter"). In the letter, Hiawatha attempts to respond to the DOGM Letter that had been directed to the Debtor related to the incomplete application to transfer the Permit.

c. Attached as part of the Hiawatha Letter is an "Application for Coal Permit Processing" signed by Elliot Finley on October 1, 2008. This Application, which identifies the relevant permit as the Debtor's Permit to coal mine, acknowledges that the Debtor is the "Permittee" and is titled a "Permit Transfer." (Hiawatha Letter at p. 4.) The Application indicates that it requires public notice, and that it requires or includes ownership or control information. (*Id.*) Attached to the Application is a "Detailed Schedule Of Changes to the Mining and Reclamation Plan" related to the Permit, which purports to provide, among other things, "updated" ownership information. (*Id.* at p. 5.) Attached to this Schedule is a statement identifying Hiawatha as the "applicant" and striking all references to the Debtor and substituting Hiawatha as the owner of the mine and the Permit. (*Id.* at pp. 6-7.)³

d. The Application for Coal Permit Processing attached to the Hiawatha Letter is signed by Elliot Finley, as President of Hiawatha, who is identified in the above-described papers as the President and Resident Agent of Hiawatha. (*See* Hiawatha Letter

³ In the Hiawatha Letter, Finley also states that Hiawatha holds a mining lease with C.O.P. Coal Development Company ("COP Coal") to mine coal. This statement totally disregards Paragraph 9 of this Court's July 23, 2008 Order holding COP Coal in contempt and stating that any attempt to terminate the Debtor's Operating Agreement to be null and void (Docket No. 98.) Carl E. Kingston is the Registered Agent of COP Coal, as well as of the Debtor and Hiawatha. Aquila reserves all rights to seek relief against any additional persons discovered to be acting in violation of the automatic stay and/or any order of this Court.

at pp. 4 & 7.) In the Application, Mr. Finley certifies that he is “a responsible official of the applicant and that the information contained in th[e] application is true and correct to the best of [his] information and belief in all respects with the laws of Utah in reference to commitments, undertakings, and obligations herein.” (*Id.* at p. 4.)

ARGUMENT

THE COURT SHOULD ISSUE AN ORDER TO SHOW CAUSE TO REQUIRE HIAWATHA AND FINLEY TO APPEAR AND EXPLAIN THEIR TOTAL DISREGARD OF THE AUTOMATIC STAY AND THIS COURT’S PRESERVATION ORDER.

Based on the foregoing, Aquila requests that the Court enter an order to show cause directed at Hiawatha and Finley. As set forth above, they had actual notice of this bankruptcy case. Despite this, they have been taking actions expressly stayed under section 362(a)(3) of the Bankruptcy Code. Specifically, Hiawatha and Finley’s unsuccessful attempts to transfer the Debtor’s Permit to Hiawatha are acts to “obtain possession of property of the estate or of property from the estate” and attempts to “exercise control over property of the estate.”⁴

Furthermore, Hiawatha and Finley plainly had actual knowledge of this Court’s Preservation Order, which expressly mandates the Debtor to set for hearing upon notice to all parties in interest any “attempt from [August 8, 2008] forward to transfer, sell or to seek approval of the transfer or sale of the Debtor’s assets to . . . Hiawatha . . . outside the ordinary course of the Debtor’s business.”⁵ This encompasses “any portion of the Sale Agreement between the Debtor and Hiawatha that has not yet been consummated including the approval of

⁴ 11 U.S.C. § 362(a)(3).

⁵ Preservation Order at 3.

the sale by various governmental agencies and regulatory agencies or commissions.”⁶ In fact, Hiawatha apparently was so concerned about the possible impact of the Preservation Order on the Permit transfer application pending at DOGM that Hiawatha itself provided a copy of the Preservation Order to DOGM.⁷

Despite this, Hiawatha and Finley decided not to obey the Preservation Order. Since August 8, 2008, despite this Court’s very express mandate, Hiawatha and Finley have continued to take action, apparently on behalf of or in concert with the Debtor,⁸ to have the Debtor’s Permit transferred to Hiawatha without providing any notice to any parties in interest or seeking any approval of this Court.

Based on these actions, the Court should require Hiawatha and Finley to appear and show cause as to (1) why they are not violating 11 U.S.C. § 362(a)(3); (2) why they are not acting contrary to this Court’s Preservation Order; and (3) why civil contempt damages should not be imposed against them to compel them to comply with the automatic stay and to remedy their failure to timely comply with the automatic stay. In addition, in the event that either Hiawatha or Finley fails to comply with the OSC, the Court should give Hiawatha and Finley notice that it may certify the facts in this case to the District Court to hold Hiawatha and Finley in criminal contempt of court.⁹

⁶ *Id.*

⁷ **Exhibit 4** at p. 1.

⁸ Aquila recently filed a motion for the appointment of a chapter 11 trustee (Docket No. 218), based primarily on the Debtor’s apparent wholesale failure to act as a fiduciary for its creditors and the chapter 11 estate, including its cooperation with and failure to oppose Hiawatha’s continuing efforts to obtain approval from DOGM for the proposed transfer of the Debtor’s valuable Permit to Hiawatha.

⁹ See DUtCivR 83-7.5.

By this OSC Motion, Aquila is not asking that the Court at this time to find that contempt exists. Rather Aquila only requests that the Court enter the OSC to require Hiawatha and Finley to appear and explain what appears to be ongoing contempt of the automatic stay and the orders of this Court.

Entry of the OSC is appropriate in this case in light of the fact that, as set forth above, Hiawatha and Finley had actual notice of this bankruptcy case and the Preservation Order. Despite having notice, neither Hiawatha nor Finley sought relief from the automatic stay or acted in any way to indicate that they are working with the Debtor to comply with the Preservation Order. In fact, it appears that the Hiawatha and Finley (and perhaps the Debtor) are attempting to bypass the Preservation Order by having Hiawatha, instead of the Debtor, seek to have the Debtor's Permit transferred.¹⁰ These acts are an open and willful violation of section 362(a)(3) and are taken in contempt of the Preservation Order.¹¹

¹⁰ The Debtor's attempted sale of its operating assets to Hiawatha cannot be fully consummated unless and until all regulatory approvals are obtained, including approval from DOGM for a transfer of the Debtor's Permit. The Debtor is directly enjoined from completing this transaction without prior approval from the Bankruptcy Court after notice and a hearing pursuant to 11 U.S.C. § 363. So, rather than continuing openly with its efforts to get the Permit transferred, the Debtor is apparently encouraging Hiawatha to go forward with its efforts to obtain the Permit transfer. The Debtor cannot be allowed to accomplish through Hiawatha what the Preservation Order plainly prohibits.

¹¹ See, e.g., *In re Lucre Mang. Group, LLC*, 365 F.3d 874, 875 (10th Cir. 2004) (contempt exists if a court finds that the party violated a specific and definite court order and the party had notice of the order); *In re Skinner*, 917 F.2d 444 (10th Cir. 1990) (bankruptcy court has authority to find civil contempt for violation of section 362(a), and contempt is shown when party acts in violation of automatic stay with notice of bankruptcy case).

CONCLUSION

For all of the reasons set forth above, Aquila requests that the Court grant the OSC Motion and thus enter the proposed OSC.

Dated this 30th day of October, 2008.

RAY QUINNEY & NEBEKER P.C.

/s/ Peggy M. Hunt

Keith A. Kelly (4748)

Steven W. Call (5260)

Peggy M. Hunt (6060)

Steven C. Strong (6340)

Attorneys for Aquila, Inc.

1007942

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MEMORANDUM IN SUPPORT OF *EX PARTE* MOTION OF AQUILA, INC. FOR ORDER TO SHOW CAUSE WHY HIAWATHA COAL COMPANY, INC. AND ELLIOT FINLEY SHOULD NOT BE HELD IN CIVIL CONTEMPT** was electronically filed on October 30, 2008 and therefore served on the following parties through the Court's CM/ECF system:

- David E. Leta dleta@swlaw.com, wsmart@swlaw.com,;kgoley@swlaw.com
- Joel T. Marker joel@mbt-law.com
- John T. Morgan tr john.t.morgan@usdoj.gov, james.gee@usdoj.gov
- Oliver K. Myers myersok@msn.com
- Paul James Toscano ptoscano@expresslaw.com, eallred@expresslaw.com;bgonzales@expresslaw.com;ptpcecf@gmail.com
- United States Trustee USTPRegion19.SK.ECF@usdoj.gov
- Russell S. Walker rwalker@wklawpc.com, ckirk@wklawpc.com
- David R. Williams dwilliams@wklawpc.com, rbeattie@wklawpc.com

I further certify that on October 30, 2008 a copy of the foregoing **MEMORANDUM IN SUPPORT OF *EX PARTE* MOTION OF AQUILA, INC. FOR ORDER TO SHOW CAUSE WHY HIAWATHA COAL COMPANY, INC. AND ELLIOT FINLEY SHOULD NOT BE HELD IN CIVIL CONTEMPT** was served via first-class mail, postage prepaid, upon the following parties:

Conrad H. Johansen
Olsen Skoubye & Nielson
999 East Murray-Holladay Road, Suite 200
Salt Lake City, UT 84117

John Deere Construction & Forestry Co.
P.O. Box 6600
Johnston, IA 50131-6600

Mark Hansen
Attorney for Standard Industries and C.O.P.
Coal Development Co.
431 North 1300 West
Salt Lake City, UT 84116

Internal Revenue Service
Centralized Insolvency Operations
P.O. Box 21126
Philadelphia, PA 19114-0326

Carl E. Kingston
Registered Agent, Hiawatha Coal Company,
Inc. and Attorney for C.O.P. Coal
Development Company
3212 South State Street
Salt Lake City, UT 84115

Elliot Finley, Resident Agent
Hiawatha Coal Company, Inc.
5550 West Bear Canyon Road
Huntington, UT 84528

Hiawatha Coal Company
P.O. Box 1240
Huntington, UT 84528

Hiawatha Coal Company
P.O. Box 1245
Huntington, UT 84528

Elliot Finley
Hiawatha Coal Company, Inc.
5550 West Bear Canyon Road
Huntington, UT 84528

Elliot Finley
Hiawatha Coal Company, Inc.
3212 South State Street
Salt Lake City, UT 84115

Utah Division of Oil, Gas & Mining
1594 West North Temple, Suite 1210
Salt Lake City, UT 84116

Utah Division of Oil, Gas & Mining
319 N. Carbonville RD. #C
Price, UT 84501-2351

U.S. Environmental Protection Agency
1595 Wynkoop St.
Denver, CO 80202-1129

State of Utah Division of Water Quality
288 North 1460 West
P.O. Box 144870
Salt Lake City, UT 84114-4870

Utah Division of Water Rights
1636 West North Temple
Salt Lake City, UT 84116

Utah Division of Water Rights
Southeastern Regional Office
319 Carbonville Road
P.O. Box 718
Price, UT 84501

Utah Labor Commission
160 East 300 South, 3rd Floor
Salt Lake City, UT 84111

Utah Labor Commission
Office of Coal Mine Safety
940 South Carbon Ave.
Price, UT 84501

U.S. Dept. of Labor, Mine Safety & Health
P.O. Box 25367, DFC
Denver, CO 80225-0367

Utah Division of Air Quality
150 North 1950 West
Salt Lake City, UT 84116

Emery County Zoning Commission
P.O. Box 417
Castle Dale, UT 84513

I further certify that on October 30, 2008 a copy of the foregoing **MEMORANDUM IN SUPPORT OF *EX PARTE* MOTION OF AQUILA, INC. FOR ORDER TO SHOW CAUSE WHY HIAWATHA COAL COMPANY, INC. AND ELLIOT FINLEY SHOULD NOT BE HELD IN CIVIL CONTEMPT** was served via email upon the following parties:

John T. Morgan
John.t.morgan@usdoj.gov

Steve Alder
Assistant Utah Attorney General
stevealder@utah.gov

I further certify that on October 30, 2008 a copy of the foregoing **MEMORANDUM IN SUPPORT OF *EX PARTE* MOTION OF AQUILA, INC. FOR ORDER TO SHOW CAUSE WHY HIAWATHA COAL COMPANY, INC. AND ELLIOT FINLEY SHOULD NOT BE HELD IN CIVIL CONTEMPT** was served via facsimile upon the following parties:

Hiawatha Coal Company
435-687-2084

/s/ Carrie A. Watters



State of Utah
Department of
Natural Resources

MICHAEL R. STYLER
Executive Director

Division of
Oil, Gas & Mining

JOHN R. BAZA
Division Director

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

Representatives Present During the Inspection:

OGM Karl Houskeeper Environmental Scientist III

Inspection Report

Permit Number:	C0150025
Inspection Type:	COMPLETE
Inspection Date:	Monday, October 06, 2008
Start Date/Time:	10/6/2008 8:30:00 AM
End Date/Time:	10/6/2008 12:30:00 PM
Last Inspection:	Monday, September 08, 2008

Inspector: Karl Houskeeper, Environmental Scientist III

Weather: Cloudy, Temp. 60 Deg. F.

InspectionID Report Number: 1788

Accepted by: jhelfric
10/7/2008

Permitee: **CO-OP MINING CO**

Operator: **CO-OP MINING CO**

Site: **BEAR CANYON MINE**

Address: **PO BOX 1245, HUNTINGTON UT 84528**

County: **EMERY**

Permit Type: **PERMANENT COAL PROGRAM**

Permit Status: **ACTIVE**

Current Acreages

10,967.39	Total Permitted
40.46	Total Disturbed
	Phase I
	Phase II
	Phase III

Mineral Ownership

- ☒ Federal
☐ State
☐ County
☒ Fee
☐ Other

Types of Operations

- ☒ Underground
☐ Surface
☐ Loadout
☐ Processing
☐ Reprocessing

Report summary and status for pending enforcement actions, permit conditions, Division Orders, and amendments:

Shawn Baker represented the company during the inspection.

Special Conditions:

- (1) Submit water quality into EDI site. Condition being met monthly.
- (2) Co-Op will not initiate coal mining and reclamation operations on federal leases UTU-61048, UTU-61049, UTU-46484, and UTU-24316 until federal mining plan approval is signed by the Assistant Secretary of Land and Minerals for this mine plan modification. Condition met, approved July 3, 2007.
- (3) The permit is conditioned upon the issuance of the Forest Service letter of consent. Condition met.
- (4) Must submit amended air quality approval order within 30days of approval to allow 2.5 million tpy from 1.95 tpy. Still in process, no approval yet.
- (5) Develop raptor mitigation plan and include in MRP by July 1, 2007. Submitted to Division Incorporation date November 2007 located in Appendix 30.

Inspector's Signature: _____

Karl Houskeeper, Environmental Scientist III

Inspector ID Number: 49

Date Monday, October 06, 2008

Note: This inspection report does not constitute an affidavit of compliance with the regulatory program of the Division of Oil, Gas and Mining.

Permit Number: C0150025
 Inspection Type: COMPLETE
 Inspection Date: Monday, October 06, 2008

Inspection Continuation Sheet

Page 2 of 3

REVIEW OF PERMIT, PERFORMANCE STANDARDS PERMIT CONDITION REQUIREMENTS

1. Substantiate the elements on this inspection by checking the appropriate performance standard.
 - a. For COMPLETE inspections provide narrative justification for any elements not fully inspected unless element is not appropriate to the site, in which case check Not Applicable.
 - b. For PARTIAL inspections check only the elements evaluated.
2. Document any noncompliance situation by reference the NOV issued at the appropriate performance standard listed below.
3. Reference any narratives written in conjunction with this inspection at the appropriate performance standard listed below.
4. Provide a brief status report for all pending enforcement actions, permit conditions, Division Orders, and amendments.

	Evaluated	Not Applicable	Comment	Enforcement
1. Permits, Change, Transfer, Renewal, Sale	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
2. Signs and Markers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
3. Topsoil	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.a Hydrologic Balance: Diversions	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4.b Hydrologic Balance: Sediment Ponds and Impoundments	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4.c Hydrologic Balance: Other Sediment Control Measures	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.d Hydrologic Balance: Water Monitoring	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4.e Hydrologic Balance: Effluent Limitations	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
5. Explosives	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Disposal of Excess Spoil, Fills, Benches	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Coal Mine Waste, Refuse Piles, Impoundments	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Noncoal Waste	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Protection of Fish, Wildlife and Related Environmental Issues	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. Slides and Other Damage	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. Contemporaneous Reclamation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12. Backfilling And Grading	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13. Revegetation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14. Subsidence Control	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15. Cessation of Operations	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
16.a Roads: Construction, Maintenance, Surfacing	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
16.b Roads: Drainage Controls	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
17. Other Transportation Facilities	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18. Support Facilities, Utility Installations	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
19. AVS Check	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20. Air Quality Permit	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
21. Bonding and Insurance	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
22. Other	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

1. Permits, Change, Transfer, Renewal, Sale

The current DOGM permit C/015/0025 was issued effective 04/03/2007 and expires 11/02/2010.

-Certificate of Insurance policy number GL 360 21 36, issued 06/24/2008 and terminates 11/01/2009.

-UPDES permit # UTG040000(UTG040006) effective 08/01/2008 and expires @ midnight 04/30/2013.

-Air Quality permit DAQE-145-02, issued February 22, 2002.

-SPCC Plan dated 09/14/06. The Plan is P.E. certified, stamped, signed and dated by a Utah P.E.

2. Signs and Markers

The ID signs contained the necessary information.

4.a Hydrologic Balance: Diversions

Minor maintenance is required on several diversions from recent storm events.

4.b Hydrologic Balance: Sediment Ponds and Impoundments

The sediment ponds were last inspected on 08/28/2008.

4.d Hydrologic Balance: Water Monitoring

Second quarter 2008 water monitoring is in the EDI website and uploaded.

4.e Hydrologic Balance: Effluent Limitations

The Permittee (Hiawatha Coal Company) has applied for and received a modification to the UPDES permit for the site; the modification is the name change to Hiawatha Coal Company. UPDES permit # UTG040006 became effective on August 1, 2008; the date of permit expiration is April 30, 2013.

21. Bonding and Insurance

Bond through Lyndon Property Insurance Company NPL-0601-310000 for \$1,825,000.

0040

C/O 15/025 Incoming
cc: Priscilla
Joe
B

Hiawatha Coal Company

P.O. Box 1245
Huntington, Utah 84528



Office (435) 687-2450
FAX (435) 687-2084

October 3, 2008

Coal Program
Utah Division of Oil, Gas & Mining
1594 West North Temple, Suite 1210
P.O. Box 145801
Salt Lake City, Utah 84114-5801

To Whom It May Concern,

Re: Application to Change existing Mining Plan, Permit Transfer Task ID #3022 Bear Canyon Mine, ACT/015/025

Enclosed are five hard copies of the response for Task ID #3022

If you have any questions, please call me at (435) 687-5238.

Thank You,

E. Finley
Elliot Finley

Enclosure(s)

MR/mr

RECEIVED
OCT 09 2008
DIV. OF OIL, GAS & MINING

Response to Deficiencies Letter for Task #3022 Dated September 4, 2008 signed by Daron R. Haddock

Deficiency 1

R645-303-321.300 and R645-301-111.400 and R645-301-112.330

Gustafson departed before Hiawatha Coal bought the Bear Canyon Mine and the Bear Canyon Permit so the departure date is not applicable to the Bear Canyon Permit. The start date for the secretary at the time the permit was sold is included on page 1-1 of the application.

Deficiency 2

R645-303-321.300 and R645-301-112.100

The page with these items on it were emailed to Joe Helfrich on 8-28-08 at his request. We also cc a copy to Pete Hess because he is our inspector. It appears Joe replaced the original C1 and C2 forms with the ones sent on 8-28, but failed to replace some of the pages. We have included another copy of page 1-1 with this response.

Deficiency 3

R645-321.300 and R645-301-112.230

See comments on the above deficiency. Another copy of the updated page 1-1 has been included.

Deficiency 4

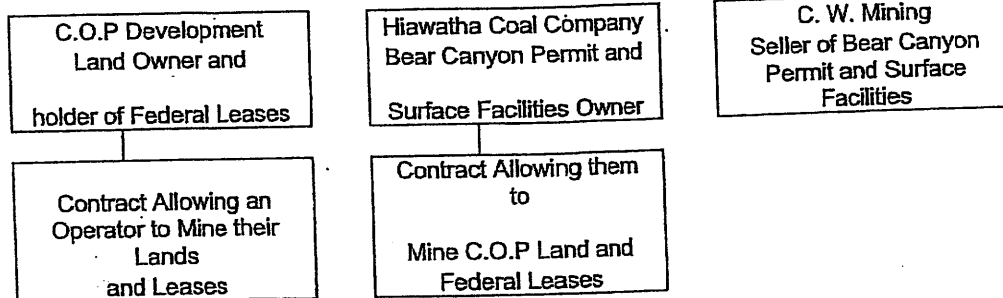
R645-303-321.300 and R645-301-112.310

See comments on Deficiency 2. Another copy of the updated page 1-1 has been included.

Deficiency 5

R645-303-321.300 and R645-301-112.420

The companies are completely independent companies. None of the companies share common officers, agents, or controllers. There are no common stock holders owning 10 to 50% stock in either company. Hiawatha Coal holds a lease with C.O.P. Development giving Hiawatha right-of-entry to all C.O.P. land and federal leases.



Deficiency 6

R645-303-321.300 and R645-301-121.200

The title of Table 1-1 located on page 1-2 is "Officers Authorized to Act on Behalf of Hiawatha Coal Company" we feel the title clearly indicates which company the officers represent so we made no changes.
The permit number for the Hiawatha Permit has been corrected to match the Division records
For the remaining items see the comments under Deficiency 2

Deficiency 7

R645-303-321.100

See comments under Deficiency 2

Deficiency 8

R645-303-322

As you can see from the following timeline the Division was reviewing the application concurrently with the public notice. Hiawatha Coal should not be punished for the Division misplacing the application and not getting it to the reviewers while the public notice was running.

Timeline

On June 24, 2008 Charles Reynolds, Elliot Finley, and Nathaniel Finely hand delivered the initial amendment to DOGM. Daron Haddock of the Division requested minor changes to the public notice.

On June 25, 2008 Charles Reynolds met with Mark Reynolds and the changes requested by Daron were made. The Sun Advocate was contacted and the updated amendment was mailed to the Division.

On July 1, 2008 The Sun Advocate published the notice. Melissa Reynolds made a copy of the actual newspaper and sent it to the Division

On July 28, 2008 Mark Reynolds called Daron Haddock for an update on the permit transfer. Daron called Mark back and told him the application had been lost and to please send another copy. He does state that Angela is on vacation and that she may be able to find it when she returns.

On August 28, 2008 Melissa Reynolds emailed a copy of the notarized public notice to Joe Helfrich and Pete Hess.

Deficiency 9

R645-303-323 and R645-301-820.100,

Hiawatha Coal is currently working on transferring the bond. Once the transfer is complete a copy of the new bond will be sent to the Division

Deficiency 10

R645-301-890

The updated liability insurance has been included.

APPLICATION FOR COAL PERMIT PROCESSING

Permit Change ☐ New Permit ☐ Renewal ☐ Exploration ☐ Bond Release ☐ Transfer ☒

Permittee: CO-OP MINING COMPANY

Mine: BEAR CANYON MINE

Permit Number: ACT/015/025

Title: Permit Transfer

Description, include reason for application and timing required to implement:
To Update the Ownership and Control Information

Instructions: If you answer yes to any of the first eight (gray) questions, this application may require Public Notice publication.

1. Change in the size of the Permit Area? Acres: _____ Disturbed Area: _____ ☐ increase ☐ decrease.
2. Is the application submitted as a result of a Division Order? DO# _____
3. Does the application include operations outside a previously identified Cumulative Hydrologic Impact Area?
4. Does the application include operations in hydrologic basins other than as currently approved?
5. Does the application result from cancellation, reduction or increase of insurance or reclamation bond?
6. Does the application require or include public notice publication?
7. Does the application require or include ownership, control, right-of-entry, or compliance information?
8. Is proposed activity within 100 feet of a public road or cemetery or 300 feet of an occupied dwelling?
9. Is the application submitted as a result of a Violation? NOV # _____
10. Is the application submitted as a result of other laws or regulations or policies?
- Explain: _____
11. Does the application affect the surface landowner or change the post mining land use?
12. Does the application require or include underground design or mine sequence and timing? (Modification of R2P2)
13. Does the application require or include collection and reporting of any baseline information?
14. Could the application have any effect on wildlife or vegetation outside the current disturbed area?
15. Does the application require or include soil removal, storage or placement?
16. Does the application require or include vegetation monitoring, removal or revegetation activities?
17. Does the application require or include construction, modification, or removal of surface facilities?
18. Does the application require or include water monitoring, sediment or drainage control measures?
19. Does the application require or include certified designs, maps or calculation?
20. Does the application require or include subsidence control or monitoring?
21. Have reclamation costs for bonding been provided?
22. Does the application involve a perennial stream, a stream buffer zone or discharges to a stream?
23. Does the application affect permits issued by other agencies or permits issued to other entities?

Please attach four (4) review copies of the application. If the mine is on or adjacent to Forest Service land please submit five (5) copies, thank you. (These numbers include a copy for the Price Field Office)

I hereby certify that I am a responsible official of the applicant and that the information contained in this application is true and correct to the best of my information and belief in all respects with the laws of Utah in reference to commitments, undertakings, and obligations, herein.

Elliot Finley

Print Name

E. Finley, Pres., 10-1-08

Sign Name, Position, Date

Subscribed and sworn to before me this 1 day of October, 2008

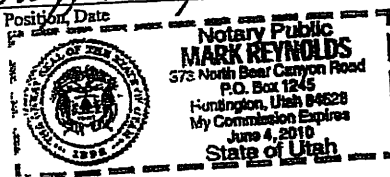
Mark Reynolds

Notary Public

My commission Expires:

Attest: State of Utah 6-11, 2010 ss:

County of Endor



For Office Use Only:

Assigned Tracking Number:

Received by Oil, Gas & Mining

APPLICATION FOR COAL PERMIT PROCESSING

Mine: BEAR CANYON MINE

Permit Number: ACT/015/025

Title: Permit Transfer

Provide a detailed listing of all changes to the Mining and Reclamation Plan, which is required as a result of this proposed permit application. Individually list all maps and drawings that are added, replaced, or removed from the plan. Include changes to the table of contents, section of the plan, or other information as needed to specifically locate, identify and revise the existing Mining and Reclamation Plan. Include page, section and drawing number as part of the description.

DESCRIPTION OF MAP, TEXT, OR MATERIAL TO BE CHANGED

[illegible]

Any other specific or special instruction required for insertion of this proposal into the Mining and Reclamation Plan.

Received by Oil, Gas & Mining

R645-301-100 GENERAL CONTENTS

R645-301-112 Identification of Interests

112.100 Statement of corporation

~~C.W. Mining~~ Hiawatha Coal Company is a corporation, incorporated in the state of Utah. ~~C.W. Mining~~ Hiawatha Coal Company is the payer of the abandoned mine reclamation fee. Federal Identification Number: 87-0399230 84-1418097.

112.200-230 Names, addresses, and telephone numbers of the applicant, and the applicant's resident agent who will accept service of process.

Applicant: ~~C.W. Mining Company~~ Hiawatha Coal Company, Inc.
53 West Angelo Ave 5550 West Bear Canyon Road
Salt Lake City, UT 84115 Huntington, UT 84528
(801) 486-5047 (435) 687-5777

Resident Agent ~~Charles Reynolds~~ Elliot Finley
P.O. Box 1245 5550 West Bear Canyon Road
Huntington, UT 84528 Huntington, UT 84528
(435) 687-2450 (435) 687-5777

112.300 For Applicants other than single proprietorships:

112.310 Name and address of each officer, partner, principal, principal shareholder, and director or other person performing a function similar to a director

C.O.P. Coal Development Company is the fee area and leaseholder of lands within the permit area. C.O.P. Coal Development Company has subleased all fee and federal coal rights to ~~C.W. Mining~~ Hiawatha Coal Company for inclusion in the Bear Canyon LMU.

Corporate Office: C.O.P. Coal Development Co.
3212 South State Street
Salt Lake City, Utah 84115

Name	Title	Address
J. O. Kingston	President	53 West Angelo Ave, S.L.C., Ut. 84115
J. D. Kingston Jr.	Vice President	53 West Angelo Ave, S.L.C., Ut. 84115
Luanna Kingston	Sec./Treas.	53 West Angelo Ave, S.L.C., Ut. 84115

112.320 Not Applicable

112.330 The title of the person's position, date position was assumed, and when submitted under R645-300-147.

Table 1-1 Officers Authorized to Act on Behalf of C.W. Mining Hiawatha Coal Company

Name	Title	Address	Start Date
B. W. Stoddard Elliot Finley	President	P.O. Box 300, Huntington, Ut 84528 5550 West Bear Canyon Road, Huntington, UT 84528	01/01/76 06/30/97
C. W. Reynolds Nathaniel Finley	Vice Pres.	P.O. Box 1245, Huntington, Ut 84528 5550 West Bear Canyon, Huntington, UT 84528	07/01/04 06/30/97
D. J. Sanders Nathaniel Finley	Sec./Treas.	53 West Angelo Ave., S.L.C., Ut 84115 5550 West Bear Canyon Road, Huntington, UT 84528	06/17/93 06/30/97
C. W. Reynolds Elliot Finley	Res. Agent	P.O. Box 1245, Huntington, Ut 84528 5550 West Bear Canyon Road, Huntington, UT 84528	07/01/04 06/30/97

112.340 All names under which the applicant operates or previously operated a coal mine and reclamation operation in the United States within the 5 years preceding the date of application.

~~C.W. Mining is doing business as (DBA) Co Op Mining Company~~

Not Applicable

112.350 Not Applicable

112.400 Pending, current, and previous coal mining and reclamation operation permit applications.

~~C/015/021 Utah Division of Oil Gas and Mining~~

~~C/015/025 Utah Division of Oil Gas and Mining~~

~~C/007/011 Utah Division of Oil Gas and Mining~~

112.410 Federal or State permit numbers and MSHA numbers, the date of issuance, and the regulatory authority.

See Table 1-2 on the following page.

Sep. 8, 2008 3:29PM Slowly Insurance

No. 0535

P. 2 (HAUSDENNY)

ALICIA CERTIFICATE OF LIABILITY INSURANCE

8/6/2008

PRODUCER

Young Insurance Group LLC
2580 West 4700 South
Taylorsville, UT 84118
(801) 417-8088

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURED

Hiawatha Coal Company
P.O. Box 1240
Huntington, UT 84528
(435) 687-5777

INSURERS AFFORDING COVERAGE

INSURER A: AEG

INSURER B:

INSURER C:

INSURER D:

INSURER E:

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

MARKET CLASS	TYPE OF COVERAGE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS
1	GENERAL LIABILITY <input type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMSMADE <input checked="" type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER <input type="checkbox"/> POLICY <input checked="" type="checkbox"/> PRO. PER. <input type="checkbox"/> LOC.	GL 360 21 36	5/24/2008	1/1/2009	EACH OCCURRENCE \$ 1,000,000 DAMAGES SUFFERED BY PERSONS AND PROPERTIES \$ 100,000 MEDICAL EXPENSES \$ 10,000 PERSONAL & ADJ. INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMPLETED \$ 1,000,000
2	AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS				COMBINED SINGLE LIMIT (Per accident) \$ BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
3	GARAGE LIABILITY <input type="checkbox"/> ANY AUTO				AUTO ONLY - EA ACCIDENT \$ OTHER THAN ADDITIONAL \$ AGG. \$
4	EXCESS/UMBRELLA LIABILITY <input type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMSMADE <input type="checkbox"/> DEDUCTIBLE <input type="checkbox"/> RETENTION				EACH OCCURRENCE \$ AGGREGATE \$ \$ \$ \$
5	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY EMPLOYER/EMPLOYEE EXCLUSIVE OFFICER/EMPLOYEE EXCLUDED FIRST CLASS DAMAGE SPECIAL PROVISIONS APPLY				WORKERS COMPENSATION - HIGH-TORTUOUSITY - PER \$ CL. EXCLUDED \$ EL. DISEASE - EA EMPLOYEE \$ EL. DISEASE - POLICY LIMIT \$
6	OTHER				

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS

BEAR CANYON MINE PERMIT # C-015-0025

COVERAGE IS PROVIDED FOR DAMAGE INCURRED FROM THE USE OF EXPLOSIVES.

CERTIFICATE HOLDER

DIVISION OF OIL, GAS, & MINING
1594 WEST NORTH TEMPLE
BOX 145801
SALT LAKE CITY, UT 84114-5801
ATTN: PAM
FAX (801) 359-3940

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BY REGISTERED MAIL, RETURN RECEIPT REQUESTED.
AUTHORIZED REPRESENTATIVE

ACORD 25 (2001/08)

© ACORD CORPORATION 1988

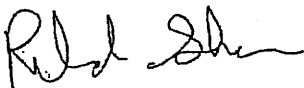
AFFIDAVIT OF PUBLICATION

STATE OF UTAH)

ss.

County of Emery,)

I, Richard Shaw, on oath, say that I am the Publisher of the Emery County Progress, a weekly newspaper of general circulation, published at Castle Dale, State and County aforesaid, and that a certain notice, a true copy of which is hereto attached, was published in the full issue of such newspaper for 1 (One) consecutive issues, and that the first publication was on the 1st day of July, 2008 and that the last publication of such notice was in the issue of such newspaper dated the 1st day of July, 2008.



Richard Shaw - Publisher

Subscribed and sworn to before me this 1st day of July, 2008.



Notary Public My commission expires January 10, 2011 Residing at Price, Utah

Publication fee, \$ 107.28



LINDA THAYNE
NOTARY PUBLIC-STATE OF UTAH
845 EAST MAIN
PRICE, UTAH 84501
COMM. EXP. 01-10-2011

NOTICE

Co-Op Mining Company, P.O. Box 1245, Huntington, UT 84528 hereby announces its intent to transfer Permit No. C/015/025, originally issued November 1, 1985 and last renewed November 2, 2005 to Hiawatha Coal Company. The Bear Canyon Mine is located in Bear Canyon, approximately 12 road miles west of Huntington, Utah. The permit area, found on the USGS Hiawatha Quadrangle map, is described as follows:

A-116S, R7E SLBM Sec. 1 Lots 1 and 2, S1/2 NE1/4, SE1/4

Sec. 10 N1/2, N1/2 S1/2, SE1/4 SW1/4, S1/2 SE1/4

Sec. 11 All

Sec. 12 All

Sec. 13 All

Sec. 14 NE1/4, E1/2 NW1/4, S1/2

Sec. 23 E1/2, E1/2 W1/2

Sec. 24 All

Sec. 25 All

Sec. 26 N1/2 NE1/4, N1/2 SW1/4 NE1/4 and the access/haul road as shown on Plate 1-1 of the Bear Canyon Mining and Reclamation Plan

T16S, R8E SLBM Sec. 6 Lots 11-14, E1/2 SW1/4, W1/2 SE1/4, SE1/4 SE1/4

Sec. 7 All

Sec. 8 W1/2, W1/2 E1/2

Sec. 16 All

Sec. 17 All

Sec. 18 All

Sec. 19 N1/2, SW1/4, N1/2 SE1/4, SW1/4 SE1/4

Sec. 20 N1/2, N1/2 SW1/4, NE1/4 SE1/4

Sec. 21 N1/2, SE1/4, N1/2 SW1/4, SE1/4 SW1/4

Sec. 30 W1/2, W1/2 NE1/4, NW1/4 SE1/4

Sec. 31 NE1/4, NW1/4, NW1/4 NE1/4

Written comments, objections, or requests for informal conference should be directed to the Utah Division of Oil, Gas, & Mining, P.O. Box 145891, Salt Lake City, Utah, 84114-5891. Copies of the transfer current mining plan are available for public inspection at the office of the Utah Division of Oil, Gas, & Mining, Salt Lake City, and at the Emery County Recorder's Office, Emery County Courthouse, Castle Dale, Utah, 84513.

Published in the Emery County Progress July 1, 2008.

C.O.P. COAL DEVELOPMENT COMPANY

53 West Angelo Avenue
Salt Lake City, Utah 84115

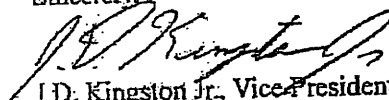
August 19, 2008

Coal Program
Utah Division of Oil, Gas & Mining
1594 West North Temple, Suite 1210
P.O. Box 145801
Salt Lake City, Utah 84114-5801

To Whom it may concern,

Please be advised that C.O.P. Coal Development Company is the record owner of the fee ground and Federal Coal Lease #'s 020668, 024316, 024318, 38727, 46484, 61048 and 61049, located in Bear Canyon, Emery County, Utah, which includes all of the real property involved in Permit No. Act/015/025. C.O.P. is currently leasing all of the property to Hiawatha Coal Company and the lease permits Hiawatha Coal Company to use the land for coal mining and related activities. This lease agreement will automatically be extended without amendments unless either party gives 30 days written notice of cancellation.

Sincerely,



J.D. Kingston Jr., Vice President
C.O.P. Coal Development Company

Agreement

This agreement made and entered in this 19 day of August 2008, by and between C.O.P. Development (C.O.P.) and Hiawatha Coal Company, a Utah Corporation, (Hiawatha Coal) WHEREAS, there is an existing road in emery county known as Bear Canyon Road, and WHEREAS, Hiawatha Coal requires extensive use of said road, and WHEREAS, C.O.P. is the owner of the private portion of the road, NOW, THEREFORE, be it agreed as follows:

1. The parties hereto agree and acknowledge that the southern 0.65 Miles of the road known as Bear Canyon Road is a county road. Said county road runs from State Road 31 in a northerly direction for approximately 0.65 Miles to a presently existing gate. Thereafter the road is a private road owned by C.O.P.
2. Hiawatha Coal will indemnify and defend C.O.P. For any damage caused, or loss incurred to or claim made by any public or private individual, firm, group, association, partnership or corporation as a result of any mining related activities conducted on the private road.
3. Hiawatha Coal agrees to allow access to other property served by Bear Canyon Road. Said access shall be allowed to the owner of the property, their successor in interest or any other individual, firm, group, association, partnership or corporation who requires access due to their association with the owner or because the owner has granted permission to the individual, firm, group, association, partnership or corporation to go upon his property. Hiawatha Coal will not withhold access due to the type of activity which the then owner or his agents, employees or invitees intend to or in fact conduct.
4. It is further understood that any additional improvements of Bear Canyon Road will be at the expense of all primary users.
5. Hiawatha Coal agrees to reclaim the private Bear Creek Road according to the specifications outlined below.
 - a) Hiawatha Coal will completely reclaim all portions of the road except those areas required for access to the hunting cabin.
 - b) Hiawatha Coal will leave the road access to the hunting cabin at least 20 feet wide and at a slope not greater than 20%.
 - c) Hiawatha Coal agrees to leave all upgrades to the hunting cabin access road in place. These upgrades include, but are not limited to road base, asphalt, concrete, and drainage controls.
 - d) C.O.P. Reserves the right to require Hiawatha Coal to leave any additional portions of all portions of Bear Canyon Road intact post-mining at C.O.P.'s discretion.

IN WITNESS WHEREOF, this agreement is executed the day and year above.

C.O.P. Development

By [Signature]
Officer C.O.P. Development

IN WITNESS WHEREOF this agreement is executed at Huntington, Utah. Dated this 19 day of August 2008

Hiawatha Coal company

By [Signature]
Officer Hiawatha Coal



State of Utah
Department of
Natural Resources

MICHAEL R. STYLER
Executive Director

Division of
Oil, Gas & Mining

JOHN R. BAZA
Division Director

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

Representatives Present During the Inspection:

Company	Mark Reynolds	Resident Agent
OGM	Pete Hess	Environmental Scientist III

Inspection Report

Permit Number:	C0150025
Inspection Type:	PARTIAL
Inspection Date:	Monday, September 08, 2008
Start Date/Time:	9/8/2008 9:20:00 AM
End Date/Time:	9/8/2008 11:25:00 AM
Last Inspection:	Tuesday, August 05, 2008

Inspector: Pete Hess, Environmental Scientist III

Weather: Cool, partly cloudy.

InspectionID Report Number: 1758

Accepted by: jheltric
9/8/2008

Permittee: **CO-OP MINING CO**

Operator: **CO-OP MINING CO**

Site: **BEAR CANYON MINE**

Address: **PO BOX 1245, HUNTINGTON UT 84528**

County: **EMERY**

Permit Type: **PERMANENT COAL PROGRAM**

Permit Status: **ACTIVE**

Current Acreages

10,967.39	Total Permitted
40.46	Total Disturbed
	Phase I
	Phase II
	Phase III

Mineral Ownership

- ☒ Federal
☐ State
☐ County
☒ Fee
☐ Other

Types of Operations

- ☒ Underground
☐ Surface
☐ Loadout
☐ Processing
☐ Reprocessing

Report summary and status for pending enforcement actions, permit conditions, Division Orders, and amendments:

The Bear Canyon site received 0.44 inches of rainfall on August 31, 2008. The Permittee notified the Division on September 2, 2008 that the second quarter of 2008 surface and ground water monitoring information was in the electronic data base pipeline, ready for uploading into the permanent data base. The Permittee continues to meet this Special Condition of Attachment "A" of the current State permit. Mr. Shawn Baker represented the Permittee during today's inspection.

Inspector's Signature: _____

Pete Hess

Date Monday, September 08, 2008

Pete Hess, Environmental Scientist III

Inspector ID Number: 46

Note: This inspection report does not constitute an affidavit of compliance with the regulatory program of the Division of Oil, Gas and Mining.

1594 West North Temple, Suite 1210, PO Box 145801, Salt Lake City, UT 84114-5801
telephone (801) 538-5340 • facsimile (801) 359-3940 • TTY (801) 538-7458 • www.ogm.utah.gov

Permit Number: C0150025
 Inspection Type: PARTIAL
 Inspection Date: Monday, September 08, 2008

Inspection Continuation Sheet

Page 2 of 3

REVIEW OF PERMIT, PERFORMANCE STANDARDS PERMIT CONDITION REQUIREMENTS

1. Substantiate the elements on this inspection by checking the appropriate performance standard.
 - a. For COMPLETE inspections provide narrative justification for any elements not fully inspected unless element is not appropriate to the site, in which case check Not Applicable.
 - b. For PARTIAL inspections check only the elements evaluated.
2. Document any noncompliance situation by reference the NOV issued at the appropriate performance standard listed below.
3. Reference any narratives written in conjunction with this inspection at the appropriate performance standard listed below.
4. Provide a brief status report for all pending enforcement actions, permit conditions, Divison Orders, and amendments.

	Evaluated	Not Applicable	Comment	Enforcement
1. Permits, Change, Transfer, Renewal, Sale	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
2. Signs and Markers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Topsoil	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.a Hydrologic Balance: Diversions	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.b Hydrologic Balance: Sediment Ponds and Impoundments	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.c Hydrologic Balance: Other Sediment Control Measures	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.d Hydrologic Balance: Water Monitoring	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.e Hydrologic Balance: Effluent Limitations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Explosives	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
6. Disposal of Excess Spoil, Fills, Benches	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Coal Mine Waste, Refuse Piles, Impoundments	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Noncoal Waste	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Protection of Fish, Wildlife and Related Environmental Issues	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
10. Slides and Other Damage	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11. Contemporaneous Reclamation	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
12. Backfilling And Grading	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
13. Revegetation	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
14. Subsidence Control	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
15. Cessation of Operations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
16.a Roads: Construction, Maintenance, Surfacing	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
16.b Roads: Drainage Controls	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
17. Other Transportation Facilities	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18. Support Facilities, Utility Installations	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
19. AVS Check	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20. Air Quality Permit	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
21. Bonding and Insurance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
22. Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

1. Permits, Change, Transfer, Renewal, Sale

The Permittee has submitted an ownership and control change to the Division which would transfer all assets associated with C.W. Mining Company to Hiawatha Coal Company. This is currently being reviewed within the Division, in conjunction with review by the US Bankruptcy Court for the District of Utah. C.W. Mining has filed a Chapter 11 in an attempt to argue the lawsuit filed by Aquila, (electricity and natural gas provider for several states east of the Rocky Mountains). Aquila is owned by Great Plains Energy and the Black Hills Corporation.

5. Explosives

Day boxes (type 3 magazines) for explosives storage were checked for cartridges and detonators; none were observed. The day boxes were located adjacent to the type 1 magazines (permanent storage for high explosives). The area was clean and orderly.

9. Protection of Fish, Wildlife and Related Environmental Issues

Several blooming musk thistle plants were observed on the south side of the canyon accessing the east end of the #4 Mine conveyor. Mr. Baker was asked to either spray these plants with herbicide or clip and collect the seed pods to minimize the apreading of this Utah noxious weed.

13. Revegetation

The Permittee intends to install erosion control excelsior matting on the inside slope NE end of pond "B" to stabilize the soils in the area. The matting is on order.

16.a Roads: Construction, Maintenance, Surfacing

The asphalt paving of the dual lane truck loading and the truck turnaround loop has been completed. Concrete pads were poured beneath the coal chutes where trailers are spotted for loading. The surface drains located between the canyon access and the east side loading lane were open and appeared capable of functioning.

20. Air Quality Permit

The access road to the #3 Mine needed wetting. The pad at the #4 Mine portal also needed wetting.

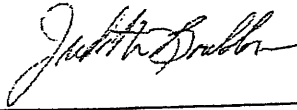
0035

gt Incoming
C/015/0025

From: Mark Reynolds <mark.reynolds@hiawathacoal.com>
To: Dana Dean <danadean@utah.gov>, <stevealder@utah.gov>
CC: Pete Hess <petehess@utah.gov>
Date: 8/13/2008 4:51 PM
Subject: [Fwd: [Fwd: Fw: Judge Boulden's ruling]]
Attachments: 1101 bkr ruling on motion to preserve assets.pdf; 1101 bkr order on motion to preserve assets.pdf

The below described is SIGNED.

Dated: August 07, 2008



JUDITH A. BOULDEN
U.S. Bankruptcy Judge



IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re:

C.W. MINING COMPANY, a Utah
corporation,

Putative Debtor.

Case No. 08-20105

Chapter 11

MEMORANDUM DECISION DENYING IN PART AND GRANTING IN PART
MOTION OF AQUILA, INC. FOR ORDER PRESERVING AND PROTECTING
ASSETS OF BANKRUPTCY ESTATE AND REQUESTING NOTICE AND HEARING
IN CONNECTION WITH DEBTOR'S PURPORTED SALE OF SUBSTANTIALLY ALL
OPERATING ASSETS TO A RELATED ENTITY

Before the Court is the Motion of Aquila, Inc. (Aquila) for Order Preserving and Protecting Assets of Bankruptcy Estate and Requesting Notice and Hearing in Connection With Debtor's Purported Sale of Substantially All Operating Assets to a Related Entity (Motion). In the Motion, Aquila, a prepetition judgment creditor of the putative Debtor, C.W. Mining Company (Debtor), seeks an order: (1) prohibiting the Debtor from using, transferring, encumbering, or disposing of any of its assets outside the ordinary course of business without first obtaining this Court's approval; (2) requiring the Debtor to give notice to all parties in interest of

its efforts to sell and transfer all of its assets to a related entity; (3) prohibiting the Debtor from taking any action to transfer, terminate, assign, impair, or encumber the Debtor's long-term right to mine coal under an operating agreement (Coal Operating Agreement) between the Debtor and COP Coal Development Company (COP Coal); and (4) providing that if the Court approves a sale that the buyer Hiawatha Coal Company, Inc. (Hiawatha) pay into the Court's registry or an escrow account all consideration paid for the purchase of the Debtor's assets until further order of the Court. The Debtor and Standard Industries, Inc. (Standard Industries) oppose the Motion. An evidentiary hearing was held on August 1, 2008. At the hearing, Steve Strong and Keith Kelly appeared on behalf of Aquila, one of the petitioning creditors. Paul Toscano and Russell Walker appeared on behalf of the Debtor. Mark Hansen appeared on behalf of creditor Standard Industries, and Tyler Foutz appeared on behalf of petitioning creditor Owell Precast, LLC.

The parties have briefed the legal issues and presented evidence and argument to the Court. Following the evidentiary hearing, the matter was taken under advisement.¹ After considering the evidence, assessing the credibility of the witness, considering the arguments of counsel, and conducting an independent review of applicable case law, the Court makes the following ruling.

I. FACTS

This involuntary chapter 11 case was filed on January 8, 2008 by three petitioning creditors: Aquila, House of Pumps, Inc., and Owell Precast, LLC. An order for relief has not been entered, and the involuntary petition is scheduled for trial in October 2008.

¹ After the Court took the Motion under advisement, Aquila filed a supplement to the motion. The Court has taken into consideration the facts and arguments presented in the supplemental pleading.

On October 30, 2007, before the involuntary case was commenced, Aquila obtained a money judgment against the Debtor in the United States District Court for the District of Utah (District Court). On December 19, 2007, the District Court entered a Supplemental Order in Aid of Enforcement of Judgment (Supplemental Order). The Supplemental Order states: "Given the size of the judgment and given the transfer of interest by CWM noted in the deposition of CWM's president Charles Reynolds, there is significant risk that CWM will attempt to transfer its assets to prevent Aquila from executing and recovering its damages." The District Court went on to order that "CWM shall preserve its assets and not transfer or dispose of its assets other than in the ordinary course of business; provided, however, CWM may sell assets for the purpose of making its payroll after giving one week's advance notice to Aquila before such sale occurs." The Supplemental Order also precludes CWM from taking "any action that may result in the termination of its Coal Operating Agreement ("Lease") with COP Coal Development Co ("COP"), dated March, 1997. . . ." The involuntary petition was filed shortly after the Supplemental Order was entered.

The testimony of Mr. Charles Reynolds (Reynolds), the president of the Debtor, established that the Debtor entered into a Purchase and Sale Agreement (Sale Agreement) with Hiawatha sometime in June 2008. Under the terms of this Sale Agreement, the Debtor sold or is in the process of selling substantially all of its operating assets to Hiawatha. Section 3 of the Sale Agreement provides: "The full purchase price, except for the amount due in accordance with § 1.02 above, shall be payable at closing, in cash or by the assumption of indebtedness to secured creditors, as determined in accordance with §§ 1.01, 1.04, 1.05, and 1.06 above." It appears that Hiawatha has purchased the assets of the Debtor through an assumption of liabilities only. There

is no evidence that Hiawatha has paid the Debtor any cash in conjunction with the sale. Aquila's judgment debt is not one of the debts assumed by Hiawatha. Reynolds is now employed by Hiawatha, and most of the miners once employed by the Debtor are now employed by Hiawatha.

II. JURISDICTION

The Debtor has argued that this Court lacks both subject matter and personal jurisdiction over the Debtor and its assets. The Court disagrees with this conclusion. Pursuant to the Bankruptcy Code, the Court obtained jurisdiction over the Debtor and its 11 U.S.C. § 541 property² at the time the involuntary petition was filed with the Court. The fact that the Debtor is contesting the involuntary filing does not divest the Court of its subject matter jurisdiction. This Court has stated: "The filing of a petition sufficient on its face clearly gives the bankruptcy court jurisdiction over an involuntary case."³ Therefore, the Court finds that its jurisdiction is proper under 28 U.S.C. §§ 1334 and 157(a). This Court also has personal jurisdiction over the Debtor based on proper service of the involuntary petition pursuant to Rule 1010 of the Federal Rules of Bankruptcy Procedure (Bankruptcy Rules). Further, the Court finds that this is a core matter under 28 U.S.C. § 157(b), and this Court may make a final determination.

² See 11 U.S.C. § 541(a) which provides: "The commencement of a case under section 301, 302, or 303 of this title creates an estate." All future statutory references are to title 11 of the United States Code unless otherwise indicated.

³ *In re Alta Title Co.*, 55 B.R. 133, 137 (Bankr. D. Utah 1985) (Clark, J.) (stating that "[w]hile some courts have labeled the three petitioning creditor requirement 'jurisdictional,' this requirement is not jurisdictional in the sense of subject matter jurisdiction, but is a substantive matter which must be proved or waived if put in issue").

III. SECTIONS 362(a)(2) AND 303(f)

Aquila argues, among other things, that the Debtor has violated the Supplemental Order by transferring its assets to Hiawatha and that this Court should grant the relief sought in its Motion and also declare the sale reflected in the Sale Agreement void. In response, the Debtor contends that it entered into the Sale Agreement merely to preserve the Debtor's assets in an attempt to comply with the Supplemental Order⁴ and that § 303(f) gives it the ability to sell its assets without notice to parties in interest and without Court approval until an order for relief is entered. The parties agree that § 303 governs this issue. Subsection (f) of § 303 provides: "Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced." Therefore, during this "gap" period, the Debtor has the ability to continue to use, acquire, or dispose of property inside or outside the ordinary course of business without notice to parties in interest or Court approval unless the Court orders otherwise. Aquila argues, however, that § 303(f) excuses an involuntary debtor's compliance with § 363(b) during the gap period only to the extent the debtor would be authorized outside of bankruptcy to make such transfers. Aquila maintains that this Debtor was not authorized to enter into the Sale Agreement without complying with § 363 because doing so was a violation of the Supplemental Order. In response, the Debtor argues that Aquila fails to take into account other applicable provisions of the Bankruptcy Code that impact this involuntary

⁴ Because resolution of the Motion turns on an interpretation of the Bankruptcy Code, it is unnecessary for the Court to resolve various disputed issues of fact. But the Court notes in passing the incongruity of arguing that transferring assets of a company preserves those assets for the company.

filing, namely the automatic stay provisions of § 362.

When an involuntary petition is filed under § 303 of the Bankruptcy Code, the automatic stay goes into effect precluding parties from taking various actions against a debtor or property of the estate. Specifically, § 362(a)(2) stays “the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title.”⁵ It is undisputed that Aquila obtained its judgment against the Debtor before the involuntary petition was filed. The Court also concludes that the Supplemental Order was issued to aid Aquila in its attempt to collect on its judgment pursuant to Fed. R. Civ. P. 69, DUCivR 69-1, and Utah R. Civ. P. 64. The question that remains then is this: what is the effect of the automatic stay on this Supplemental Order?

When a petition for bankruptcy relief is filed the stay makes a prepetition judgment unenforceable without further order of the court.⁶ This is the case even when a supplemental order issued in an attempt to enforce the judgment contains restrictive or injunctive-like language. DUCivR 69-1(a), under which the Supplemental Order was issued, specifically provides that “[t]he moving party, on proper affidavit, may request that the debtor or other person be ordered to refrain from alienation or disposition of the property or assets in any way detrimental to the moving party’s interest.” This is exactly what the Supplemental Order did. It restrained the

⁵ See *In re Weitzman*, 381 B.R. 874, 882 (Bankr. N.D. Ill. 2008) (denying creditor’s request to sue chapter 13 trustee in non-bankruptcy forum and stating that creditor’s attempt to collect prepetition judgment against chapter 13 trustee and estate property held by that trustee was not permitted by the automatic stay). The bankruptcy court in *Weitzman* wrote: “The stay prevents, among other actions, the enforcement of a prepetition judgment against the debtor or property of the estate. 11 U.S.C. § 362(a)(2). In other words, when the automatic stay is in effect, prepetition judgments are incapable of enforcement.” *Id.*

⁶ See §362(a)(2).

Debtor, prepetition, from using or disposing of its assets outside the ordinary course of business and from taking any actions that may result in the termination of its Coal Operating Agreement with COP Coal. When the automatic stay went into effect, the October 2007 judgment and any orders supplemental thereto became unenforceable without first seeking relief from the provisions of the automatic stay. In voluntary cases, other provisions of the Code such as § 363 would replace the injunctive provisions of the Supplemental Order and give statutory structure to transactions involving § 541 property. But to enforce the Supplemental Order post-petition in this unadjudicated involuntary case, Aquila was required to move to either lift the § 362 stay to continue to enforce the Supplemental Order, or to immediately file its § 303(f) motion for the Court to “order otherwise” and restrict the Debtor’s unfettered use of its assets.⁷

The Court recognizes that ruling that the automatic stay prevents enforcement of a prepetition injunctive or restraining-type order could result in “a parade of horrors,” but the Bankruptcy Code provides exceptions to the application of the automatic stay that deal with this potential parade. Section 362(b) provides for at least twenty-eight scenarios where the stay does not go into effect. The Supplemental Order does not fit into any one of the twenty-eight exceptions. As a result, the Supplemental Order is subject to the automatic stay, and this Court cannot enforce it to prevent the transfer that has already occurred.

Although there is very little case law directly on point, the bankruptcy court in *In re Weitzman* was presented with the following scenario. During the pendency of a debtor’s chapter

⁷ The legislative history of § 303(f) indicates that imposition of restrictions on a putative debtor may be appropriate when the debtor intends to conceal, dispose, or abscond with estate assets in a manner that would be detrimental to the debtor’s creditors. See S. Rep. No. 989, 95th Cong., 2d Sess. 33, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5819.

13 case, a prejudgment creditor issued a third-party citation to the chapter 13 trustee ordering the trustee to appear before the state court to answer questions regarding any assets of the debtor in the trustee's control, and the citation prohibited the trustee from transferring any portion of the debtor's non-exempt assets. The court found that the prepetition judgment could not validly support the commencement of a supplemental proceeding because § 362(a)(2) prohibited such actions.⁸ As articulated in *Weitzman*, the automatic stay prohibits any attempt to use a supplemental proceeding or a supplemental order to enforce a prepetition judgment.⁹ As a result, the automatic stay prohibited the enforcement of the Supplemental Order at the time the Sale Agreement was executed.

This analysis may frustrate Aquila's attempted collection of its prepetition judgment. Under § 303, Aquila could have come before this Court and asked it to require the Debtor to comply with § 363 and other provisions of the Code before the adjudication of the involuntary or to appoint an interim trustee but it failed to do so.¹⁰ Aquila's delay in bringing the Motion allowed the filing of the involuntary petition to shield the Debtor from the consequences of the Supplemental Order with no commensurate obligations on the Debtor's part to protect and

⁸ *Weitzman*, 381 B.R. at 882. Under Illinois law, a judgment creditor can initiate supplemental proceedings to discover the assets of a judgment debtor. Both the judgment debtor and any third party that might hold the debtor's assets are subject to this citation. The citation may include "restraining provisions" which keep the judgment debtor or a third party from disposing of the assets. DUCiv. R 69-1(a) has a similar provision which allows the District Court to issue an order requiring the debtor to refrain from alienating or disposing of the property or assets in any way detrimental to the creditor who is attempting to collect its judgment.

⁹ *See also Galmore v. Dykstra (In re Galmore)*, no. 07-2205 JPK, 2008 WL 2879680 at *8, ___ B.R. ___, (Bankr. N.D. Ind. July 25, 2008) (holding that a bench warrant, used postpetition by a creditor to have the debtor arrested, was civil in nature and subject to § 362(a)(2)).

¹⁰ *See In re Professional Accountant Referral Services, Inc.*, 142 B.R. 424 (Bankr. D. Colo. 1992) (holding that an interim trustee can be appointed during the gap period).

preserve assets of the estate. This may not be what Aquila and the other petitioning creditors intended when they filed the involuntary petition, but it is the result nonetheless. The Bankruptcy Code simply says what it says, and this Court cannot change that fact.

The Court will, however, pursuant to § 303(f), order that from this point forward any use, transfer, or disposition of any of the Debtor's assets outside the ordinary course of the Debtor's business is subject to the provisions of § 363 of the Bankruptcy Code. If the Debtor wants to transfer, sell, or seek approval of the transfer or sale of its assets to Hiawatha or any other party outside the ordinary course of the Debtor's business, a motion must be filed, set for hearing, and properly noticed out to all parties pursuant to the Bankruptcy Code and Bankruptcy Rules. This order applies to any portion of the Sale Agreement or any other post-petition transfer that has not yet been consummated including the approval of the sale by various governmental agencies and regulatory agencies or commissions.

Standard Industries argued that any order of this Court that restricts or restrains the Debtor from operating or transferring its assets should be obtained through an adversary proceeding pursuant to Rule 7001. Under Rule 7001, an attempt to obtain an injunction or other equitable relief requires the commencement of an adversary proceeding.¹¹ The relief granted in this order, however, is not an injunction or other equitable relief as contemplated by Rule 7001. In "ordering otherwise," the restrictions this Court is imposing on the Debtor's future transfer, use, or disposition of assets outside the ordinary course of business, or its attempts to take any action in furtherance of the consummation of the Sale Agreement, are authorized by § 303(f)

¹¹ See FED. R. BANKR. P. 7001 which provides: "An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings: . . . (7) a proceeding to obtain an injunction or other equitable relief"

which allows this Court to “prevent a debtor from controlling an asset [or assets] during the ‘gap period’ between the filing of the involuntary petition and the entry of an order for relief.”¹²

Requiring the Debtor to comply with the provisions of § 363, Rule 6004, and Rule 2002 when taking steps to act outside the ordinary course of business is not akin to an injunction and does not require the commencement of an adversary proceeding.

IV. CONCLUSION

Before the involuntary bankruptcy petition was filed, the relationship between the Debtor and its creditor Aquila was governed by the District Court, the October 2007 judgment, and the Supplemental Order. But when the petitioning creditors filed the involuntary bankruptcy petition, the parties’ relationship and their abilities to act became subject to the provisions of the Bankruptcy Code. It is within the framework of the Bankruptcy Code that these parties must now operate. Section 362(a)(2) is clear. Aquila is prohibited from enforcing a prepetition judgment against the Debtor or property of the estate after the automatic stay goes into effect unless the stay is lifted. Based on the foregoing, Aquila’s Motion is DENIED in part and GRANTED in part. A separate order will be issued in conjunction with this Memorandum Decision.

-----END OF DOCUMENT-----

¹² *Jenkins v. Hodes (In re Hodes)*, 402 F.3d 1005, 1009 (10th Cir. 2005) (petitioning creditors filed a motion, not an adversary proceeding, to stop the construction of a home and to restrict the putative debtors’ use of deposit funds). Similarly in this case, Aquila filed a motion rather than an adversary proceeding to attempt to stop the Debtor’s transfer of its assets and to restrict further transfers of its assets without court order after notice and a hearing.

_____0000000_____

SERVICE LIST

Service of the foregoing MEMORANDUM DECISION DENYING IN PART AND GRANTING IN PART MOTION OF AQUILA, INC. FOR ORDER PRESERVING AND PROTECTING ASSETS OF BANKRUPTCY ESTATE AND REQUESTING NOTICE AND HEARING IN CONNECTION WITH DEBTOR'S PURPORTED SALE OF SUBSTANTIALLY ALL OPERATING ASSETS TO A RELATED ENTITY will be effected through the Bankruptcy Noticing Center to each party listed below and to the MATRIX:

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Counsel for Standard Industries, Inc.

The below described is SIGNED.

Dated: August 07, 2008



JUDITH A. BOULDEN
U.S. Bankruptcy Judge



IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re:

C.W. MINING COMPANY, a Utah
corporation,

Putative Debtor.

Case No. 08-20105

Chapter 11

ORDER DENYING IN PART AND GRANTING IN PART MOTION OF AQUILA, INC.
FOR ORDER PRESERVING AND PROTECTING ASSETS OF BANKRUPTCY
ESTATE AND REQUESTING NOTICE AND HEARING IN CONNECTION WITH
DEBTOR'S PURPORTED SALE OF SUBSTANTIALLY ALL OPERATING ASSETS TO
A RELATED ENTITY

Before the Court is the Motion of Aquila, Inc. (Aquila) for Order Preserving and Protecting Assets of Bankruptcy Estate and Requesting Notice and Hearing in Connection With Debtor's Purported Sale of Substantially All Operating Assets to a Related Entity (Motion). In the Motion, Aquila, a prepetition judgment creditor of the putative Debtor, C.W. Mining Company (Debtor), seeks an order: (1) prohibiting the Debtor from using, transferring, encumbering, or disposing of any of its assets outside the ordinary course or business without first obtaining this Court's approval; (2) requiring the Debtor to give notice to all parties in interest of

its efforts to sell and transfer all of its assets to a related entity; (3) prohibiting the Debtor from taking any action to transfer, terminate, assign, impair or encumber the Debtor's long-term right to mine coal under an operating agreement between the Debtor and COP Coal Development Company (COP Coal); and (4) providing that if the Court approves a sale that the buyer Hiawatha pay into the Court's registry or an escrow account all consideration paid for the purchase of the Debtor's assets until further order of the Court. The Debtor and Standard Industries, Inc. (Standard Industries) oppose the Motion. An evidentiary hearing was held on August 1, 2008. At the hearing Steve Strong and Keith Kelly appeared on behalf of Aquila, one of the petitioning creditors. Paul Toscano and Russell Walker appeared on behalf of the Debtor. Mark Hansen appeared on behalf of creditor Standard Industries, and Tyler Foutz appeared on behalf of petitioning creditor Howell Precast LLC.

At the conclusion of the hearing, the Court took the Motion under advisement and has issued this day a **Memorandum Decision Denying In Part and Granting In Part Motion of Aquila, Inc. For Order Preserving and Protecting Assets of Bankruptcy Estate and Requesting Notice and Hearing In Connection With Debtor's Purported Sale of Substantially All Operating Assets to a Related Entity (Memorandum Decision)** which is incorporated herein by reference. Based on the reasoning set forth in the Memorandum Decision, it is hereby

ORDERED that the Motion is GRANTED in part and DENIED in part. It is further **ORDERED** that from this point forward any use, transfer, or disposition of any of the

Debtor's assets outside the ordinary course of the Debtor's business is subject to the provisions of 11 U.S.C. § 363 of the Bankruptcy Code. It is further

ORDERED that any attempt from this point forward to transfer, sell or to seek approval of the transfer or sale of the Debtor's assets to Hiawatha Coal Mining Company (Hiawatha) or any other party outside the ordinary course of the Debtor's business must be set for hearing and properly noticed out to all parties pursuant to the Bankruptcy Code and Bankruptcy Rules. This order applies to any portion of the Sale Agreement between the Debtor and Hiawatha that has not yet been consummated including the approval of the sale by various governmental agencies and regulatory agencies or commissions.

-----END OF DOCUMENT-----

ORDER SIGNED

_____0000000_____

SERVICE LIST

Service of the foregoing **ORDER DENYING IN PART AND GRANTING IN PART
MOTION OF AQUILA, INC. FOR ORDER PRESERVING AND PROTECTING
ASSETS OF BANKRUPTCY ESTATE AND REQUESTING NOTICE AND HEARING
IN CONNECTION WITH DEBTOR'S PURPORTED SALE OF SUBSTANTIALLY ALL
OPERATING ASSETS TO A RELATED ENTITY** will be effected through the Bankruptcy

Noticing Center to each party listed below and to the MATRIX:

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JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah
DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER
Executive Director

Division of Oil, Gas and Mining

JOHN R. BAZA
Division Director

RAY QUINNEY

SEP 10 2008

& NEBEKER

September 4, 2008

Shawn Baker, Resident Agent
Co-Op Mining Company
P.O. Box 1240
Huntington, Utah 84528

Subject: Incomplete Application for Transfer of Bear Canyon Mine Permit to Hiawatha Coal Company,
Task ID #3022, Co-Op Mining Company, Bear Canyon Mine, C/015/0025

Dear Mr. Baker:

The Division staff has completed the initial review of your application to change ownership and control information in the Bear Canyon MRP. We view this as an application to transfer the Bear Canyon Permit to Hiawatha Coal Company and at this point it is considered to be incomplete. The following items (identified by the regulatory citation) need to be addressed before we can proceed with the review of your application:

R645-303-321.300 and R645-301-111.400 and R645-301-112.330, The former Secretary/Treasurer (Gustafson) departure date is required, along with the notarized signature of the Secretary of Hiawatha Coal Company.

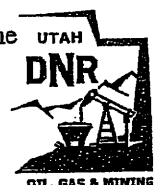
R645-303-321.300 and R645-301-112.100, The application must provide the name, address, employer identification number and telephone number for CW Mining if they remain responsible for paying the abandoned mine reclamation fee, as stated on page 1-1 of the application.

R645-303-321.300 and R645-301-112.230, The application must state whether Hiawatha Coal Company is a corporation.

R645-303-321.300 and R645-301-112.310, The employer identification numbers for the officers and directors and for the Applicant and the new Permittee were not provided.

R645-303-321.300 and R645-301-112.420, An organizational tree showing the relationship of owners and controllers and percentage ownership must be provided. (i.e. C.O.P. Development, CW Mining, and Hiawatha Coal Company)

R645-303-321.300 and R645-301-121.200, The table on page 1-2 of the application does not indicate which company these officers and directors represent. Hiawatha Coal Company? The permit number for Hiawatha is incorrectly typed on page 1-2. Two addresses are provided for the resident agent, please give one contact address, telephone number and employer identification number for the resident agent. The applicant is listed as Hiawatha Coal Company, Inc., with a Salt Lake City address, but a telephone number with a 435 prefix. This does not appear to be the accurate contact information.



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Shawn Baker
September 4, 2008

R645-303-321.100, The employer identification number of the existing Permittee must be provided.

R645-303-322, The public notice serves the purpose of advertising the filing of the application and must be run concurrently with the receipt of the application by the Division of Oil, Gas and Mining.

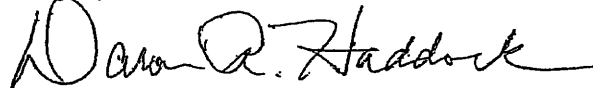
R645-303-323 and R645-301-820.100, Bonding information must be described in the application. Hiawatha Coal Company must obtain appropriate performance bond coverage in an amount sufficient to cover the proposed operations. A new or revised reclamation contract will need to be submitted as well.

R645-301-890, Liability insurance coverage for the new Permittee must be included for the Bear Canyon Mine site.

We are aware that the bankruptcy court has ordered the permit holder to refrain from transferring its permit without the court's consent. Therefore, we will continue our review and issue a decision on the permit transfer application only after Co-op Mining (1) provides the information listed above and (2) demonstrates that the court will allow the transaction to proceed.

If you have any questions, please call Joe Helfrich at (801) 538-5290 or me at (801) 538-5325.

Sincerely,



Daron R. Haddock
Permit Supervisor

an

cc: Paul James Toscano, Debtor's Counsel
Russell S. Walker, Woodbury & Kesler
Keith A. Kelly, Ray Quinney & Nebeker, P.C.
Steven W. Call, Ray Quinney & Nebeker, P.C.
Steve Strong, Ray Quinney & Nebeker, P.C. ✓
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John T. Morgan, U.S. Trustees
David E. Leta, Snell & Wilmer
F. Mark Hansen, F. Mark Hansen, P.C.
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